

## 37 Am. Jur. 2d Fraud and Deceit § 41

American Jurisprudence, Second Edition | May 2021 Update

### Fraud and Deceit

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### III. Means of Perpetration

#### A. In General

## § 41. Modes of communication of representation—Words or conduct

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Fraud  27, 28

Fraud may be established not only by spoken or written words but by conduct covering almost the full range of human experiences.<sup>1</sup> Stated differently, a party need not make an affirmative statement to be liable for fraud.<sup>2</sup> Thus, fraud may consist of a misrepresentation,<sup>3</sup> that is, the positive assertion of a falsehood;<sup>4</sup> the creation of a false impression by words or acts;<sup>5</sup> look, or gesture;<sup>6</sup> artifice;<sup>7</sup> any trick or device;<sup>8</sup> or, under certain circumstances, by reckless statements made without knowing or caring whether they are true or not.<sup>9</sup>

Conversely, a practice may carry the capacity to mislead or deceive a reasonable person but may not be fraudulent.<sup>10</sup>

### Observation:

Puffing is permissible only where an ordinary person would not be deceived by the exaggerated claims, and the ordinary person must recognize the puffery for what it is and realize that he or she is not expected to rely on the claims made.<sup>11</sup>

For fraud in the inducement of an investment decision to be actionable, the affirmative intent to deceive must be shown; thus, at the very least, intentional or deceptive conduct must be shown.<sup>12</sup>

- <sup>1</sup> U.S. v. Schwab, 88 F. Supp. 2d 1275 (D. Wyo. 2000) (applying Wyoming law; active conduct or words which tend to produce an erroneous impression); McDaniel v. Shepherd, 577 N.E.2d 239 (Ind. Ct. App. 1991); Reis v. Peabody Coal Co., 997 S.W.2d 49 (Mo. Ct. App. E.D. 1999) (applying Kentucky law); H-D Irrigating, Inc. v. Kimble Properties, Inc., 2000 MT 212, 301 Mont. 34, 8 P.3d 95 (2000); Sipa Press, Inc. v. Star-Telegram Operating, Ltd., 181 Misc. 2d 550, 694 N.Y.S.2d 850 (Sup 1999) (allegation of fraud in the inducement may be based on an act or conduct by a defendant that is intended to deceive the plaintiff).
- <sup>2</sup> Meade v. Cedarapids, Inc., 164 F.3d 1218 (9th Cir. 1999) (applying Oregon law).
- <sup>3</sup> §§ 59 to 62.
- <sup>4</sup> Berkowitz v. Lyons, 98 N.J.L. 198, 119 A. 20 (N.J. Ct. Err. & App. 1922); Pennebaker v. Kimble, 126 Or. 317, 269 P. 981 (1928).
- <sup>5</sup> Berkowitz v. Lyons, 98 N.J.L. 198, 119 A. 20 (N.J. Ct. Err. & App. 1922); Pennebaker v. Kimble, 126 Or. 317, 269 P. 981 (1928).
- <sup>6</sup> Prime Bldg. Corp. v. Itron, Inc., 22 F. Supp. 2d 440 (E.D. Pa. 1998) (applying Pa. law); Delahanty v. First Pennsylvania Bank, N.A., 318 Pa. Super. 90, 464 A.2d 1243 (1983).
- <sup>7</sup> Lewin v. Long, 70 F. Supp. 2d 534 (D.N.J. 1999) (applying Texas law).
- <sup>8</sup> Berkowitz v. Lyons, 98 N.J.L. 198, 119 A. 20 (N.J. Ct. Err. & App. 1922); Pennebaker v. Kimble, 126 Or. 317, 269 P. 981 (1928).
- <sup>9</sup> §§ 122, 122.
- <sup>10</sup> Gaidon v. Guardian Life Ins. Co. of America, 94 N.Y.2d 330, 704 N.Y.S.2d 177, 725 N.E.2d 598 (1999).
- <sup>11</sup> Potamkin Cadillac Corp. v. Towne Cadillac Corp., 592 F. Supp. 801 (S.D. N.Y. 1984).
- <sup>12</sup> Russell v. Southern National Foods, Inc., 754 So. 2d 1246 (Miss. 2000).